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# ATTORNEYS' FEES AS RESPONSE COSTS UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT 42 U.S.C. § 9607(a)(4)(B)

## I. INTRODUCTION

Upon enacting the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the 96th Congress created a framework for litigating the environmental concerns of our communities.<sup>1</sup> CERCLA seeks to "assur[e] that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions; . . . [and] provid[e] adequate compensation to those who have suffered economic, health, or other damages."<sup>2</sup> Although relatively successful in accomplishing these goals, the effectiveness of CERCLA continues to be restricted by the inability of courts to consistently interpret the language of the act.<sup>3</sup>

Section 9607(a)(4)(B) of CERCLA allows an innocent party to recover the "necessary costs" incurred while responding to the harmful actions of other parties.<sup>4</sup> The circuits are split whether attorneys' fees are within the definition of "necessary costs" under § 9607(a)(4)(B).<sup>5</sup> Although most of the circuits which have addressed the issue

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1. See, H.R. REP. NO. 1016, 96th Cong., 2d Sess. pt. 1, at 20-21 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6122-23.

The failure to properly dispose of hazardous waste costs the public millions. An EPA report estimates that it will cost between \$13.1 and \$22.1 billion to clean up all hazardous waste that pose a danger to public health and the environment. Public opposition to new sites, caused by improper disposal in the past, is growing. Until such opposition can be lessened by demonstrating that hazardous wastes can be disposed of safely, future sites may have to be located on Federal and State lands.

2. See, S. REP. NO. 848, 96th Cong., 2d Sess., at 13 (1980).

Other purposes include: providing a fund to finance response action where a liable party does not clean up, cannot be found, or cannot pay the costs of cleanup and compensation; basing the fund primarily on contributions from those who have been generically associated with such problems in the past and who today profit from products and services associated with such substances; and providing ample Federal response authority to help clean up hazardous chemical disasters.

3. See, Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 2 (1982) ("In the instance of 'Superfund' legislation, a hastily assembled bill and a fragmented legislative history add to the usual difficulty of discerning the full meaning of the law."). Numerous courts have found the language of CERCLA ambiguous and confusing. See, e.g., *Exxon Corp. v. Hunt*, 475 U.S. 355, 363 (1986) ("CERCLA is not a model of legislative draftsmanship."); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d Cir. 1992) ("The statute is riddled with inconsistencies and redundancies."); *State of Colorado v. United States Dept. of the Interior*, 880 F.2d 481, 487 (D.C. Cir. 1989) (finding the statutory language ambiguous as to its intended scope); *Walls v. Waste Resource Corp.*, 823 F.2d 977, 979 (6th Cir. 1987) ("The plain language of CERCLA is not so plain at all but rather shrouded in considerable ambiguity.").

4. 42 U.S.C. § 9607(a)(4)(B) reads:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section — any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for any other necessary costs of response incurred by any other person consistent with the national contingency plan.

5. The circuit courts that allow awards of attorneys' fees include: *General Elec. Co. v. Litton*

agree that awarding attorneys' fees would further the goals of CERCLA,<sup>6</sup> a majority of these circuits do not find the requisite statutory language to read attorneys' fees into the definition of necessary costs.<sup>7</sup> Thus, Congress should amend § 9607(a)(4)(B) to specifically include reasonable attorneys' fees among the necessary costs recoverable by innocent parties who initiate response activities.

## II. CIRCUITS DENYING AWARDS OF ATTORNEYS' FEES

Citing the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, the First, Ninth, and Tenth Circuits have denied awards of attorneys' fees under § 9607(a)(4)(B).<sup>8</sup> *Alyeska* reaffirmed the general principle that prevailing litigants are not entitled to reasonable attorneys' fees from opposing parties.<sup>9</sup> Moreover, the Supreme Court pointed out that Congress has made provisions for attorneys' fees in specific statutes, thereby emphasizing Congress' *exclusive* power to allow such awards.<sup>10</sup>

Upon concluding that Congress did not explicitly authorize attorneys' fees under § 9607(a)(4)(B), the Ninth Circuit interpreted *Alyeska* as prohibiting the judiciary from implying Congressional intent to award such fees.<sup>11</sup> The First and Tenth Circuits have made the same ruling; however, they assert that Congressional authorization to allow awards of attorney's fees under § 9607(a)(4)(B) would promote the goals and purposes of CERCLA.<sup>12</sup> In *Louisiana-Pacific Corp. v. Asarco*, the Ninth Circuit interpreted

Indus. Automation Sys., 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478 (8th Cir. 1992); and *Donahey v. Bogle*, 987 F.2d 1250 (6th Cir. 1993). The circuit court decisions that do not allow awards of attorneys' fees include: *In re Hemingway Transp.*, 993 F.2d 915 (1st Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 126 L.Ed. 251 (1993); *Stanton Rd. Assoc. v. Lohrey Enter.*, 984 F.2d 1015 (9th Cir. 1993); *Key Tronic Corp. v. United States*, 984 F.2d 1025 (9th Cir.) *cert. granted, cert. dismissed*, \_\_\_ U.S. \_\_\_, 114 S.Ct. 652 (1993); *Louisiana-Pac. Corp. v. Asarco*, 6 F.3d 1332 (9th Cir. 1993); *FMC Corp. v. Aero Indus.*, 998 F.2d 842 (10th Cir. 1993).

6. See *infra* notes 12, 15-16.

7. See *infra* notes 8-13 and accompanying text.

8. *Alyeska Pipeline Serv. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (reversing the D.C. Court of Appeals, awarding attorneys' fees to the Wilderness Society against Alyeska Pipeline Service based upon the court's equitable powers and the theory that respondents were entitled to fees because they were performing the services of a "private attorney general."). See *In re Hemingway*, *supra* note 5; *Stanton Road*, *supra* note 5; *Key Tronic*, *supra* note 5; and *FMC Corp.*, *supra* note 5. See also, *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967); *F.D. Rich Co. v. United States For the Use of Indus. Lumber Co.*, 417 U.S. 116, 128-131 (1974); *Hall v. Cole*, 412 U.S. 1, 4 (1973).

9. *Id.* at 247.

10. *Id.* at 260 ("What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance for attorneys' fees under selected statutes granting or protecting various federal rights.").

11. See *Stanton Rd. Assoc. v. Lohrey Enter.*, 984 F.2d 1015, 1019-20 (9th Cir. 1993) (reversing the award of attorneys' fees under § 9607.). See also, *Key Tronic Corp. v. United States*, 984 F.2d 1025, 1027 (9th Cir. 1993) (holding that CERCLA does not authorize an award of attorneys' fees in a private response cost recovery action; thus, the court lacks the authority to enter an award for the legal expenses incurred by Key Tronic in searching for other potentially responsible parties.), *cert. granted, cert. dismissed*, \_\_\_ U.S. \_\_\_, 114 S.Ct. 652 (1993).

12. *In re Hemingway Trans.*, 993 F.2d 915, 935 (1st Cir. 1993) (holding that although a strong case may be made that attorney fee awards in private cost recovery actions promote CERCLA's remedial aims, that case is one for the legislative venue.), *cert. denied*, 114 S.Ct. 303 (1993). See also, *FMC Corp. v. Aero Indus.*, 998 F.2d 842, 848 (10th Cir. 1993) (holding that awards of attorneys' fees would further the goals of CERCLA by encouraging private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others. The Tenth Circuit remanded to the district court to determine whether any of the non-litigation attorneys' fees were necessary to the contain-

*Alyeska* as applying specifically to attorneys' fees, allowing a district court to determine if other litigation expenses could be recovered under CERCLA.<sup>13</sup> The court seeks to implement the goals of CERCLA by awarding recovery of economic losses to the prevailing party, including as much of litigation costs as possible within the boundaries of controlling precedent.

### III. CIRCUITS FAVORING THE AWARD OF ATTORNEYS' FEES

The Sixth and Eighth Circuits find sufficient authority in the language of § 9607(a)(4)(B) to award attorneys' fees to prevailing litigants.<sup>14</sup> In *General Electric Co. v. Litton Industrial Automation Systems, Inc.*,<sup>15</sup> the Eighth Circuit found that attorneys' fees and expenses are necessarily incurred when private parties enforce CERCLA, and "it would strain the statutory language to the breaking point to read them out of the 'necessary costs' that § 9607(a)(4)(B) allows private parties to recover."<sup>16</sup> In addition, *General Electric* held that awarding attorneys' fees is consistent with two of the main purposes of CERCLA — prompt cleanup of hazardous wastes and imposition of all cleanup costs on the responsible party.<sup>17</sup> If a private party is forced to bear the burden of attorneys' fees, the purposes of CERCLA would be undermined.<sup>18</sup> The litigation costs could easily approach or even exceed the response cost, thereby serving as a disincentive to clean the site.<sup>19</sup>

### IV. CONCLUSIONS AND RECOMMENDATIONS

Environmental litigation often involves valuable property and several potentially responsible parties. An individual who takes the initiative to cleanup a site, whether responsible or not, incurs incredible expense. Beyond the costs of engineers, environmental assessment firms, and actual cleanup crews, the individual expends a considerable amount of money on attorneys' fees. These fees include the time necessary to draw contracts and locate potentially responsible parties, as well as the litigation expenses required to hold responsible parties accountable for their actions. Once the responsible parties are discovered, CERCLA § 9607(a)(4)(B) allows the innocent party

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ment and cleanup of hazardous releases and therefore recoverable as necessary costs.). See also, *infra* notes 15-19 and accompanying text.

13. *Louisiana-Pac. Corp. v. Asarco*, 6 F.3d 1332, 1342 (9th Cir. 1993) (disallowing attorneys' fees, while not reversing the award of litigation expenses under CERCLA).

14. See *supra* note 5.

15. *General Elec.*, *supra* note 5. (requiring Litton to pay G.E. cleanup costs for cyanide-based electroplating wastes dumped on land eventually purchased by G.E. "Section 9614(f) authorizes contribution between parties liable under section 9607. Such contribution is not helpful to the less responsible party if it does not encompass a substantial portion of the financial burden imposed by the more responsible party's hazardous conduct. Therefore, section 9613 must be read to include all of a party's incurred costs. Legal fees are indisputably one of these costs.").

16. *Id.* at 1421. See also, *Donahay*, *supra* note 5 (quoting *Bolin v. Cessna Aircraft Co.*, 759 F.Supp. 692, 710 (D.Kan. 1991)):

By providing private parties with a federal cause of action for the recovery of necessary expenses in the cleanup of hazardous wastes, Congress intended 107 as a powerful incentive for these parties to expend their own funds initially without waiting for the responsible persons to take actions. The court can conceive of no surer method to defeat this purpose than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs.

17. *Id.* See also, *Gopher Oil Co. v. Union Oil Co.*, 955 F.2d 519, 527 (8th Cir. 1992) (upholding the district court's decision awarding Gopher \$559,380.52 in attorneys' fees).

18. *Id.* at 1422.

19. *Id.*

to recover necessary response costs.

The Sixth and Eighth Circuits have awarded attorneys' fees as necessary response costs under § 9607(a)(4)(B), interpreting such awards to be consistent with Congressional intent and necessary to implement the goals and purposes of CERCLA.<sup>20</sup> The First, Ninth, and Tenth circuits have not awarded attorneys' fees, perceiving themselves limited by the Supreme Court's decision in *Alyeska*;<sup>21</sup> however, these circuits recognize that awarding attorneys' fees under § 9607(a)(4)(B) would further the intended purposes of CERCLA.<sup>22</sup>

To encourage early action by private citizens, attorneys' fees must be compensable as necessary response costs. Otherwise, private citizens will wait for a court determination of CERCLA responsibility before initiating cleanup activities. A prevailing innocent party that cleans up the damage suffers considerable economic hardship without complete relief from the party that caused the damage. If Congress wants the responsible parties to pay for the damage that they have caused, while still encouraging early clean-up actions, 42 U.S.C. § 9607(a)(4)(B) must be amended to include all reasonable attorneys' fees as response costs under CERCLA. An effective amendment of § 9607(a)(4)(B) would read:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section — any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for any other necessary costs of response, *including reasonable attorneys' fees*, incurred by any other person consistent with the national contingency plan . . . ."

This amendment would give effect to the statute's purposes and resolve the split in the circuits.

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20. See *supra* notes 14-19 and accompanying text.

21. See *supra* notes 8-13 and accompanying text.

22. See *supra* notes 12-17 and accompanying text.

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